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LEGAL EMULATION BETWEEN REGULATORY COMPETITION AND COMPARATIVE LAW

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Abstract

This paper puts forward an alternative path, next to regulatory competition models and comparative law endeavours, called legal emulation.

Regulatory competition suffers from its very restrictive assumptions, which make it a relatively rare occurrence in practice. It is also exogenously driven, ignoring legal change brought about from within the law, and it takes an impoverished view of law. As for comparative law, it has tended to remain mostly mono-disciplinary. It usually lacks a dynamic dimension.

Legal emulation tries to combine the more dynamic perspective of regulatory competition, with the endogeneity of comparative law. It rests on a theoretical perspective whereby the law is conceived as the outcome of a series of choices – substantive or institutional, fundamental or transient – made between different options (legal science would then be the investigation of the set of those choices). The paper provides an outline of the legal emulation model. Legal emulation ties together and explains a number of existing phenomena in many legal orders, such as constitutional, EU or human rights review; impact assessment; peer review within networks of authories; or the open method of coordination. Finally, the paper outlines some consequences of adopting a legal emulation model.

Keywords

Regulatory competition; comparative law; functionalist method; comparative law and economics; legal emulation

JEL classification codes: K00, K10, L51

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Introduction

Globalization is affecting law just as it is other elements of society. We understand globalization here in a broad sense, including not just the increasing linkage between the economies of the world and the rise of global economic actors, but more broadly the ever-increasing mobility and communication of individuals and ideas across the globe.

Conventional wisdom holds that globalization puts pressure on national legal orders – as we know them since the rise of the nation-State – to converge towards one another, with a concomitant loss of autonomy for such systems. In a previous article, Filomena Chirico and I sought to look at the convergence and divergence between legal orders from a neutral perspective (or at least without a bias in favour of convergence), in order to understand better if and how divergence can be explained, when there truly is divergence, when divergence is not desirable and how it could be removed.[1] We used the tools of law and economics and of comparative law in so doing.

In this paper, I address a more specific question, namely how legal orders interact with each other, or put otherwise, how legal ideas circulate between legal orders. My contention is that the models found in the current literature have shortcomings, and that they are not adequate to deal with the challenges raised by globalization. Part 1 of this paper discusses the model of regulatory competition coming out of law and economics, while Part 2 discusses how comparative law tries to account for interaction. Against that background, Part 3 introduces an alternative model of 'legal emulation' which corresponds to much of the interaction observed in practice but has not yet been generalized as such.

1. REGULATORY COMPETITION

1.1. Starting point

Charles Tiebout's 1956 article "A Pure Theory of Local Expenditures" is usually seen as the first step in the development of the model of regulatory competition.[2] In his article, Tiebout was reacting to an earlier article by Paul Samuelson, wherein Samuelson pointed to a market failure regarding expenditure on public goods by authorities.[3] Samuelson's model assumed that expenditure was carried out by a central public authority. Tiebout sought to show that such failure does not occur when public goods are supplied by local authorities. In the latter case, according to Tiebout's model, local authorities will set their policies according to the combination of supply of public goods and level of local taxes which is preferred by the local constituency. Citizens are then free to choose the local community which best matches their individual preferences.

It is worth noting that Tiebout's model does not have a dynamic element. It is a static model, where an equilibrium is reached whereby a number of different preference patterns as to public

[1] Filomena Chirico and Pierre Larouche, "Conceptual Divergence, Functionalism and the Economics of Convergence", in Sacha Prechal et al, eds., *The Coherence of EU Law* (Oxford: OUP, 2008) 463.
[2] Charles M. Tiebout, "A Pure Theory of Local Expenditures" (1956) 64 J Pol Econ 416.
[3] Paul A. Samuelson, "The Pure Theory of Public Expenditures" (1954) 36 R Econ Stat 387.

expenditure co-exist, and consumer-voters are drawn to the one that matches their preferences best. Even then, the assumptions for this model to work are quite restrictive: consumer-voters are assumed to be perfectly mobile, fully informed and unaffected by differences in employment opportunities. Furthermore, there must be a large number of local communities and their choice of preference patterns should not give rise to externalities. Finally, it is assumed that there is an optimal size for each community, given its preferences, so that communities will seek to attract or lose residents in order to reach that optimal size.

In subsequent economic literature, Tiebout's model was further studied and developed, but it is fair to say that it did not have a lasting impact in its original form.[4]

1.2. Addition of a dynamic element

Over the following decades, the original Tiebout model was further developed and augmented with an element of dynamism. First of all, it was applied more specifically to law as opposed to public expenditures, and to firms as opposed to consumer-voters: market players seek the jurisdiction with the law that best matches their preferences. Secondly, instead of leading to an equilibrium with different local outcomes, choices made by market players exert pressure on local jurisdictions to change their law in order to retain market actors within their jurisdiction (to the extent that this is deemed desirable). There is therefore competition amongst jurisdictions to attract and retain market players by offering them the law[5] that they desire, hence the name "regulatory competition". As a consequence of that competition, changes take place in the law of the various competing jurisdictions; if the preferences of market actors are similar then one could expect the law of the various jurisdictions to converge. Regulatory competition models were developed first in the area of corporate law and corporate governance, in particular the choice of jurisdiction in which to incorporate a firm and its impact on the relationship between shareholders and other stakeholders. Quite a lively debate erupted in the literature. Some authors ventured that regulatory competition would produce a race to the bottom, as jurisdictions compete in progressively lowering the protection offered to shareholders against management, so as to draw management to reincorporate there.[6] Others argued the opposite: market forces – especially the threat of takeovers – provide a counterweight and ensure that the best law for shareholders ultimately wins what is then a race to the top.[7] More recent scholarship has argued that regulatory competition for corporate governance leads to either a race to the top or a race to

[4] See for instance Dennis Epple and Allan Zelenitz, "The Roles of Jurisdictional Competition and of Collective Choice Institutions in the Market for Local Public Goods" (1981) 71 Am. Econ. Rev. 87 and "The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?" (1981) J Pol. Econ. 1197.

[5] Including not just substantive law, but also procedure and institutions, and even the expertise and quality of the local legal community; see Roberta Romano, "Law as a Product: Some Pieces of the Incorporation Puzzle" (1985) 1 J Law Econ Org 225.

[6] The leading contribution remains William L. Cary, "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 83 Yale L.J. 663.

[7] See the contributions of Ralph K. Winter, "State Law, Shareholder Protection, and the Theory of the Corporation" (1977) 6 J. Legal Studies 251, Frank H. Easterbrook, "Managers' Discretion and Investors' Welfare: Theories and Evidence" (1984) 9 Del. J Corp. L 540 and Daniel R. Fischel, "The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law" (1982) 76 Nw. U. L. Rev. 913.

the bottom, depending on the topic.[8] Others have argued that 'top' and 'bottom' are essentially constructs and therefore that this debate is not all that meaningful.[9]

The following quote from Easterbrook illustrates well how the theory had evolved by the 1980s; the first two sentences refer to Tiebout's original model:[10]

> It is possible to demonstrate, albeit with some simplifying assumptions, that the goa[l] of competition to avoid exit leads jurisdictions to enact that set of laws most beneficial to the population. It is hard to place too much weight on this demonstration; the assumptions are so unrealistic that they could not be satisfied, and its predictions are not perfectly confirmed in practice. Laws surely are not optimal. But allowing for all of the difficulties with interjurisdictional competition, one can still show that exit causes a powerful *tendency* toward optimal legislation to the extent four conditions are satisfied: (1) people and resources are more mobile; (2) the number of jurisdictions increases; (3) jurisdictions can select any set of laws they desire; and (4) all of the consequences of one jurisdiction's laws are felt within that jurisdiction. The closer one comes to fulfilling these conditions, the more likely is competition among jurisdictions to be effective. If people are perfectly mobile or if there are very many jurisdictions, then the competition leads to optimal legislation; to the extent people are less mobile and jurisdictions fewer, or the other conditions less well satisfied, competition is less effective [footnotes omitted].

While regulatory competition has attracted some attention in US academic circles, its practical impact is more limited: besides the now famous Delaware story of regulatory competition for corporate charters (and more broadly for corporate governance), there are few instances where regulatory competition was actually observed in the USA.

In her recent work, Barbara Gabor points out that regulatory competition can take other channels than the movement of firms across jurisdictions or the free choice of law.[11] For instance, through international trade, jurisdictions can be pressured to seek to improve the competitiveness of the firms within their territory by changing laws and regulations to their advantage.[12] Such regulatory competition can occur without the need for factor mobility. Secondly, another channel for regulatory competition is the mobility of production factors, namely capital and labour.[13] In this case, jurisdictions are under pressure to attract these production factors, even if firms themselves do not move.[14] Considering these three channels – international trade, production factor mobility and firm mobility – regulatory competition should also be observable within a large internal market such as the EU.

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[8] See Lucien A. Bebchuk, "Federalism and the Corporation: The Desirable Limits to State Competition in Corporate Law" (1992) 105 Harv. L Rev. 1435, leading to a series of articles on why takeover regulation is subject to a race to the bottom.

[9] C.M. Radaelli, "The Puzzle of Regulatory Competition" (2004) 24 J. Pub. Pol. 1 at 9-10.

[10] F. Easterbrook, "Antitrust and the Economics of Federalism" (1983) 26 J. Law Econ. 23, 34-35.

[11] Barbara Gabor, *Institutional and Regulatory Competition in Europe: Connecting Some Pieces of the Puzzle on When, How and Why It Can Work*, Ph.D. thesis (Florence: European University Institute, 2010) at 15.

[12] As Gabor, *ibid.*, points out, even though typically subsidies are used to try to improve the competitiveness of local firms, there are also cases where regulatory reform is used instead of public funds.

[13] *Ibid.* at 18.

[14] As Gabor, *ibid.*, acknowledges, the difference between regulatory competition through the mobility of production factors and through the mobility of firms themselves can be slight.

1.3. Regulatory competition in the EU

In the wake of the 1993 Single Market effort,[15] regulatory competition theories attracted academic attention in the EU. It seemed to fit well within the 'new approach' to the internal market, with its emphasis on mutual recognition as a basis for free movement, in the absence of harmonization. When in 1993 the Maastricht Treaty enshrined the principle of subsidiarity,[16] in part to act as a damper on overly ambitious harmonization plans, one could argue that regulatory competition had found its room in Europe.

The first to make this connection was Roger Van den Bergh, in a string of articles where he sought to develop an economic analysis of the principle of subsidiarity.[17] Van den Bergh presented regulatory competition as an alternative to EU-driven, top-down legislative harmonization, and argued that harmonization should only be envisaged if and once it is clear that regulatory competition cannot work. He proposed a set of policy-making guidelines that seek to facilitate regulatory competition as much as possible.[18] Yet as Van den Bergh himself acknowledged, policy-makers in the EU so far had not taken regulatory competition seriously in the Single Market programme in the 1980s and 1990s,[19] even in areas which should be amenable to it, such as banking and insurance regulation, product standards and product liability, etc.

There was one specific area where some regulatory competition took place in the 1990s: broadcasting regulation. Following some disappointing rulings from the ECJ[20] and long negotiations amongst the various interests,[21] the famous 'Television Without Frontiers' Directive was enacted in 1989.[22] As concerns regulatory competition, the TWF Directive ushers in an almost textbook example, with broadcasting firms having a large influence in determining under which Member State jurisdiction they fall.[23] Next to that, the Directive contains a series of

[15] As driven by the Single European Act [1987] OJ L 169/1.
[16] Inserted at Article 3b of the EC Treaty, as it then was, and now to be found at Article 5 TEU.
[17] Roger Van den Bergh, "The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics" (1994) 1 Maastricht J. Eur. Comp. L. 337; Roger Van den Bergh, "Towards an Institutional Legal Framework for Regulatory Competition in Europe" (2000) 53 KYKLOS 435.
[18] Van den Bergh (2000) at 463.
[19] See also Jacques Pelkmans, Ellen de Vos and Luca Di Mauro, "Reforming Product Regulation in the EU", in G. Galli and J. Pelkmans, eds., *Regulatory Reform and Competitiveness in Europe* (Cheltenham: Edward Elgar, 2000) 238 at 261 and Radaelli, *supra* note 9 at 4-5.
[20] ECJ, Judgments of 18 March 1980, Case 52/79, *Debauve* [1980] ECR 833 and Case 62/79 *Coditel* v. *Ciné-Vog* [1980] ECR 881. In these cases, the ECJ easily accepted that Member States could invoke intellectual property protection or even different advertising regulation to prevent broadcasts from other Member States from circulating on their territory, thereby severely hampering the prospects for the internal market in broadcasting.
[21] The interests involved in these discussions cannot be easily summarized. Besides public service broadcasters and private broadcasters, whose positions were the sharpest, the European content producers also had a stake, as well as the advertising sector. Member States were divided. In the European institutions, both the liberal, pro-internal market and the 'European identity' constituencies were involved. Much of the discussion took place within the Council of Europe, whose 1989 Convention on Transfrontier Television, CETS No. 132, prefigured Directive 89/552 of 3 October 1989 [1989] OJ L 298/23, the Television Without Frontiers (TWF) Directive.
[22] *Ibid.*, now Directive 2010/13 of 10 March 2010 (Audiovisual Media Services Directive or AMSD), codifying wide-ranging amendments through Directive 2007/65 of 11 December 2007 [2007] OJ L 332/27.
[23] Art. 2(2) and ff. AMSD contain a complex set of rules to determine which single Member State has jurisdiction over a broadcaster. The main relevant criteria are the location of the head office and of the main editorial decisions, both of which can be influenced by the broadcaster. Note that the location of the target audience is *not* a relevant criterion.

regulatory provisions which every Member State is bound to enforce – on matters such as European content, advertising and the protection of minors – in order to prevent a race to the bottom on these matters. Beyond that, each Member State is free to impose more stringent regulation on broadcasters under its jurisdiction,[24] but it cannot prevent the circulation of broadcasts from another Member State.[25] As could be predicted, a number of broadcasters chose to organize their business so as to fall under jurisdiction of more 'liberal' Member States,[26] even though their broadcasts were aimed at other, more restrictive Member States. Some Member States were dissatisfied with the turn of events,[27] but the ECJ upheld the scheme of the Directive.[28] Over time, it could be observed that, through the choices of broadcasters, more restrictive Member States were put under pressure to reform their broadcasting regulation, at least to the point where broadcasters were no longer tempted to seek to place themselves under the jurisdiction of a more liberal State.[29]

The discussion of regulatory competition in Europe really took off with a string of ECJ rulings concerning the freedom of establishment of firms, starting with *Centros* in 1999.[30] In that case, Danish nationals had set up a company in the UK (Centros) for the sole purpose of doing business in Denmark. They chose the UK because UK company law allowed them to avoid the minimum capital requirements of Danish law. The ECJ held that Danish authorities could not prevent Centros from doing business in Denmark, even though Centros was a vehicle to avoid Danish law.[31] *Centros* created room for regulatory competition on corporate charters, much like in the USA. *Centros* and its progeny led to academic debates,[32] but their practical impact has been modest: while startups definitely have benefited from the ability to choose the jurisdiction

[24] *Ibid.* Art. 4(1).
[25] *Ibid.* Art. 3(1). In the case of broadcast programmes, the only exception is in cases where the foreign broadcast would infringe public order or be injurious to minors, and even then a specific procedure must be followed before a Member State can prevent the circulation of broadcasts: Art. 3(2).
[26] Traditionally, the United Kingdom and Luxembourg. For instance, from its Luxembourg base, RTL built very successful broadcasting operations in France, Belgium, the Netherlands and Germany.
[27] In particular Belgium and the Netherlands.
[28] It is interesting, on this point, to compare ECJ, 5 October 1994, Case C-23/93, *TV10 SA* v. *Commissariaat voor de Media* [1994] ECR I-4795, with ECJ, 5 June 1997, Case C-56/96, *VT4 Ltd* v. *Vlaamse Gemeenschap* [1997] ECR I-3143. The first case relates to a set of facts occuring before the entry into force of the TWF Directive, the second, after that entry into force. In the first case, the ECJ effectively allowed the Netherlands to exert jurisdiction over TV10 (established in Luxembourg), invoking the abuse of rights doctrine (Case 33/74, *Van Binsbergen* [1974] ECR 1299). In the second case, the ECJ interpreted the Directive as preventing Belgium from claiming jurisdiction over VT4 (established in the UK). In 2007, when the Directive was revised and renamed, Art. 3(2) to 3(5) were added to deal with so-called 'circumvention', but it is not clear how these provisions fit within the overall scheme of the Directive.
[29] Indeed, for a broadcaster to seek to fall under the jurisdiction of liberal Member State A while aiming its programme at the audience in restrictive Member State B, some organisational and transaction costs are incurred. This leaves Member State B with some margin to be more restrictive than A before broadcasters serving B contemplate seeking to fall under the jurisdiction of A.
[30] ECJ, 9 March 1999, Case C-212/97 *Centros* [1999] ECR I-1459; 5 November 2002, Case C-208/00 *Überseering* [2002] ECR I-9919 and 30 September 2003, Case C-167/01, *InspireArt* [2003] ECR I-10155.
[31] Unless of course Danish authorities had concrete evidence of fraudulent conduct on the part of the company or its shareholders.
[32] See among others Klaus Heine and Wolfgang Kerber, "European Corporate Laws, Regulatory Competition and Path Dependence" (2002) 13 Eur J L Econ 47, or Gerard Hertig and Joseph A. McCahery, "Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?" (2003) 4 Eur Bus Org L Rev 179.

in which to incorporate,[33] existing companies still face obstacles in moving from one jurisdiction to another.[34]

1.4. Limitations of the regulatory competition model

1.4.1. *In the literature*

In the end, the situation in practice has not changed much in the decade since Daniel Esty and Damien Geradin published their collection of essays *Regulatory Competition and Economic Integration: Comparative Perspectives*, in 2001.[35] For all the academic discussion, regulatory competition has not been observed very often outside of the limited area of corporate governance.

It seems indeed that regulatory competition, even in its looser, dynamized Easterbrook version, operates under such restrictive conditions that the model, however attractive, will rarely work in practice.[36] Esty and Geradin provide a good overview of the limitations of the regulatory competition model:[37]

- In the presence of *externalities*, the choices of one jurisdiction would inflict costs upon another, so that the legal outcome chosen by the first jurisdiction would not be efficient;[38]
- Actors may only have *imperfect information*, so that their choices are not optimal and would not reflect their true preferences;
- Actors may not enjoy enough *mobility*, i.e. they may not be in a position to choose another set of laws or move to another jurisdiction;
- Public authorities may not respond to the signals given by private actors, for various reasons found in *public choice* literature (capture, shirking and other principal/agent failures, etc.).

The limitations listed above are all directly linked with the assumptions underpinning regulatory competition, and as such one could argue that they do not add much to the discussion.[39]

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[33] See Wolf-Georg Ringe, "Sparking Regulatory Competition in European Company Law - The Impact of the Centros Line of Case-Law and its Concept of 'Abuse of Law'" in Rita de la Feria and Stefan Vogenauer, eds., *Prohibition of Abuse Law – A New General Principle of EU Law* (Oxford: Hart Publishing, 2011) 107.

[34] See the study of William Bratton, Joseph A. McCahery and Erik Vermeulen, "How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis" in Dan Prentice and Arad Reisberg, eds., *Corporate finance law in the UK and EU* (Oxford: OUP, 2011). For example, the ECJ allowed Member States that follow the real seat theory to deny their firms the ability to move their head office without changing their governing law: ECJ, 16 December 2008, Case C-210/06, *Cartesio* [2008] ECR I-9641.

[35] Daniel Esty and Damien Geradin, eds., *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford: OUP, 2001). This collective work contains contributions on regulatory competition in various sectors in the USA, in the EU and globally.

[36] See also Radaelli, *supra*, note 9 at 7-8.

[37] Daniel Esty and Damien Geradin, "Regulatory Co-opetition", in Esty and Geradin, *ibid.*, 30 at 33-40. See also D. Geradin and J.A. McCahery, "Regulatory Co-opetition: Transcending the Regulatory Competition Debate", in J. Jordana and D. Levi-Faur, eds., *The Politics of Regulation, Institutions and Regulatory Reforms in the Age of Governance* (Cheltenham: Edward Elgar, 2004) 90.

[38] F.J. Garcimartín Alférez, "Regulatory Competition: A Private International Law Approach" (1999) 8 Eur J L Econ 251 argues that private international law can help to solve externality problems. Note that externalities could also be present at firm level, i.e. the choice of a firm for its preferred law inflicts costs on others, without the firm being forced to bargain with the persons bearing those costs.

Esty and Geradin introduce other limitations which do not flow directly from the assumptions, however:

- Because of *economies of scale*, some regulatory issues are better dealt with in a centralized fashion, without regulatory competition. In fairly complicated and technical areas (food safety, public health, etc.), the cost of deciding the issues are such that it might be preferable for one single authority to take charge.[40]
- In certain cases where trade is significant and diverging laws generate significant compliance costs for traders, *transaction costs* might make regulatory competition prohibitively expensive for the gains it would generate.[41]
- If they perceive that their actions do influence the choices of public authorities, private actors will no longer simply choose between available laws, but they might engage into *strategic behaviour*, whereby their choice would be motivated by the hope of producing a given legal or regulatory outcome.

These limitations represent the boundaries of regulatory competition, i.e. cases where the model reaches its limits and can no longer be assumed to deliver optimal results.

1.4.2. *Fundamental limitations: the role of law*

In addition, the regulatory competition model seems to rely on a number of basic misconceptions regarding its very subject-matter, law. It both overestimates the impact of law on the decision of firms and takes an impoverished view of law.

On the one hand, regulatory competition assumes that law takes an excessive, if not exaggerated place in the decision-making of economic actors.[42] Indeed regulatory competition can only work if the outcome of the decisions made by firms and other actors provide a meaningful signal of their legal preferences. If other, non-legal considerations loom larger in the decisions of the firms than their preference as to the law that should govern them, then any attempt to derive useful information as to law from such decisions is misguided. In the textbook case of regulatory competition, namely the competition for corporate charters and governance, firms decide both (i) essentially on legal considerations, without non-legal aspects playing a crucial role, and (ii) in relative isolation, with the knowledge that the decision will not affect the firm beyond the range of interests directly concerned by the decision, i.e. wherever it may be incorporated, the firm will still be able to do business through the larger area within which regulatory competition is taking place, be it the USA or the EU. Under these conditions, it is possible for a firm to take a decision driven mostly if not entirely by legal considerations,[43] which means in turn that that decision can provide a meaningful signal to the public authorities. It should be readily apparent that these two

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[39] See also Catherine Barnard, "Social dumping and the race to the bottom: some lessons for the European Union from Deleware?" (2000) 25 E.L. Rev. 57 at 65-66.

[40] Esty and Geradin, *supra* note 27, speak of a 'natural legal monopoly'. Alan Sykes, "Regulatory Competition or Regulatory Harmonization? A Silly Question?" (2000) 3 J Int'l Econ. L. 257 at 263 recognizes this category but gives it a limited ambit.

[41] Chirico and Larouche, *supra* note 1 at 481-483.

[42] In addition, as pointed out by Radaelli, *supra* note 9 at 12-14, regulatory competition models posit a very simple and linear behaviour on the part of firms.

[43] Unless there is also an issue of prestige or standing – global or local – in choosing the jurisdiction to which the firm will be subject as regards corporate governance.

conditions will rarely be met, which can explain why regulatory competition is not often observed in practice.

As to the first condition (*law is crucial to the decision*), if one leaves the realm of corporate governance to look at decisions relating to production, for instance, one sees that law is but one factor in the decisions of firms, and often a minor one at that. That is because firms must take broad, strategic decisions whose legal component, if any, cannot be isolated. It is known that firms might accept to locate their production in a jurisdiction with relatively unfavourable labour or environmental laws,[44] to name but these, if it otherwise benefits from access to inputs, a qualified workforce or a favourable geographical location, for instance. Under these circumstances, it would be wrong to draw conclusions on the law based on the decisions of the firms, if the law was not determinative.[45]

As to the second condition (*isolation from other decisions*, a form of *rebus sic stantibus* condition), corporate governance is actually quite exceptional. In most other legal areas, the decision of the firm can lead to drastic consequences, which can also be taken to mean that the firm actually does not enjoy that much mobility.[46] For instance, if a firm decides to produce to its preferred product safety standard, which does not happen to meet the requirements of the USA or the EU, then it will not be able to sell its products on these markets. Even if the firm can locate its production anywhere, it cannot escape the product standards of its target markets. There is therefore no room for regulatory competition on product standards, even if may appear that differing standards from different jurisdictions are competing with one another.[47] In other cases, the rules of private international law effectively prevent regulatory competition. For instance, as regards product liability, given that in most cases the damage will occur close to the end-user, the plaintiff victim will be allowed to claim under the law of the *loci delicti*, of the place where the damage occurred, which is likely then to be the local law of the place where the end-user lives. Here firms can either refrain from selling in a jurisdiction at all or accept that the local law will apply to product liability. Their choice is very limited. More often than not, other factors will prevail over product liability concerns in the decisions of firms.

1.4.3. *Fundamental limitations: an impoverished view of law*

[44] Assuming that they cannot escape the application of such laws.

[45] This is a central flaw in a line of argument often used by lobbyists: the law of a given jurisdiction should be changed because firms find it detrimental. This argument only holds if the law is crucial to the location decisions of firms. Otherwise, it is perfectly understandable that the authorities in a jurisdiction would make a trade-off and conclude that, given the overall attractiveness of the jurisdiction, firms will accept that the law is not as favourable as they would desire.

[46] As pointed out as well by Radaelli, *supra* note 9 at 15-16.

[47] Unless of course there is a mutual recognition obligation which binds the various jurisdictions to accept each others' standards. Given that mutual recognition is usually bound with some form of agreement on the content of the standards (or at least on their objectives), what remains in the end is a fairly edulcorated form of regulatory competition. Another, more remote possibility is that a jurisdiction could be put under pressure, presumably from its own citizens, as a result of the decisions of firms not to market products perceived by citizens as essential or desirable, because the firm considers that the product standards in that jurisdiction do not enable it to achieve its business objectives.

On the other hand, regulatory competition takes an impoverished view of law. For one, law is brought back to a set of rules (including the way they are applied and implemented). Regulatory competition is then about firms choosing the rule which they prefer.

In addition to reducing law to a set of rules, regulatory competition downplays their substance. In the end, it does not really matter what the rule entails, since the process of regulatory competition will ensure an efficient outcome. That trust in process at the expense of substance lies at the core of the 'race to the bottom' line of criticism levelled at regulatory competition. The original Tieboutian model assumed that different rules would co-exist, so as to reflect the different substantive preferences of various local communities. The Easterbrook version ignores all matters of policy and turns regulatory competition into a mechanism to pick a winning rule.

Finally, regulatory competition assigns an essentially passive and reactive role to the legal actors, to those who actually shape the law (legislatures, courts, members of the legal community, etc.). Their role is to respond to the pressure exerted by market actors through the various channels (firm mobility, international trade, investment and production factor mobility). When they respond, they are meant to take notice of what the market players signalled through their decisions and act accordingly. While in line with public choice theory (which sees legal actors as mere suppliers of rules), this role does not account for the day-to-day activity of legal actors: debates and discussions within parliaments, governments, agencies, etc. go far beyond merely trying to ascertain the demands of market players and supplying law in response thereto. As will be seen further below,[48] some critical voices have tried to add an institutional dimension to regulatory competition models.

2. COMPARATIVE LAW

In comparison to regulatory competition, comparative law is a larger endeavour with a longer pedigree. In its modern form,[49] it started at the beginning of the 20th century, after the 18th and 19th centuries had witnessed the birth of national legal orders in Europe and elsewhere. The early comparatists sought to react to the nationalization of law by advocating the study of other legal orders.[50]

It is beyond the scope of this piece to provide an account of the evolution of comparative law.[51] Rather, the emphasis is put on the mainstream current in comparative law today, namely functionalism (2.1.), before considering some of its limits (2.2.).

2.1. Functionalism in comparative law

In the second half of the last century, an attempt was made to put comparative law on a more articulate and – it was hoped – sounder theoretical footing. This started with the work of Max

[48] *Infra*, heading 3.1.
[49] For historical background, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, translated by Tony Weir, 3rd ed. (Oxford: OUP, 1998) at 48 ff.
[50] See R. David, *Les grands systèmes de droit contemporains*, 8th ed. (Paris: Dalloz, 1982) at 4.
[51] For an account of the evolution of comparative law in the last decades, see Mathias Reimann, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century" (2002) 50 Am J Comp L 671.

Rheinstein at the University of Chicago (himself building on Ernst Rabel), later picked up and expanded by Konrad Zweigert and Hein Kötz in their *Introduction to Comparative Law*.[52] Rheinstein's vision was informed by other social sciences, where functionalism was at its heyday when he wrote.[53] For Rheinstein, functionalism was more than a method; it was the essence of comparative law.[54] Comparative law is about unearthing the social function of legal rules and institutions, and ultimately of law itself.

Writing somewhat later, Zweigert and Kötz built upon Rheinstein's work, yet also strayed from it on two important points. First of all, they do not envisage that comparative law relates so closely to other social sciences.[55] The idea that comparative law helps legal research rise to the same level of 'scientificity' as other social sciences, central to Rheinstein's vision, is absent in Zweigert and Kötz. Secondly, they see functionalism specifically as a method, and not as the essence of comparative law. The functionalism of Zweigert and Kötz is therefore not necessarily linked with that of other social sciences. Rather, it is a stand-alone comparative law methodology: "The basic methodological principle of all comparative law is that of *functionalism*."[56]

2.1.1. *From rules to functions*

Put simply, Zweigert and Kötz's functionalist method points to a fundamental weakness of early comparative law and attempts to remedy it. As they put it,[57] early comparative law posited the legal categories of the researcher, and went on from there to find the corresponding rules in foreign legal orders, before comparing them. For instance, if a researcher wants to study vicarious liability, he or she would look into 'tort law', '*responsabilité civile délictuelle*' or '*Schuldrecht – Besondere Teil*' for rules concerning the liability of employers for the conduct of their employees. This venture is fraught with risks: the researcher's own categories are of course linked to his or her own legal order, and may not correspond to any categories in the other legal order(s). Even if they do, the researcher might miss the corresponding categories, or wrongly identify these. Furthermore, comparing rules might not necessarily give an accurate result: these rules might be interpreted or applied in a peculiar fashion, or other rules left outside of the observation might be relevant and affect the outcome.

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[52] *Supra* note 49.

[53] See also Rudolf B. Schlesinger, *Comparative Law* (Mineola: Foundation Press, 1970) at 35. For an exploration of the various concepts of function and functionalism, see Martin Mahner and Mario Bunge, "Function and Functionalism: A Synthetic Perspective" (2001) 68 Philosophy of Science 75. Similarly, Rolf Michaels, "The Functional Method of Comparative Law", in M. Reiman and R. Zimmerman, eds., *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2006) 339 at 343-363 provides a thorough account of the various concepts of functionalism used in social sciences.

[54] See Max Rheinstein, 'Teaching Comparative Law' (1937-1938) 5 U Chi L Rev 615 at 617 and ff. See also Max Rheinstein, *Einführung in die Rechtsvergleichung*, 2nd ed. (Munich: Beck, 1987) at 25 and ff.

[55] They situate comparative law primarily in relation to other parts of legal science: Zweigert and Kötz, *supra* note 49 at 6-12.

[56] *Ibid.* at 34.

[57] One can argue whether early comparative law really overlooked the issues raised by Zweigert and Kötz, *ibid.* at 35.

In order to avoid these perils, Zweigert and Kötz advocate functionalism. As they put it, "the problem must be stated without any reference to the concepts of one's own legal order."[58] As shown by the examples put forward by the authors, the best way to formulate a problem outside of one's legal order is to try to formulate it as free from legal considerations as possible, i.e. to mentally step outside of the law. The question is then no longer "What is the law of State *X* on legal category *C*?" but rather "How does the law of State *X* deal with issue *I*?". Typically, issue *I* would be formulated as a fact pattern, e.g. a car accident, a trade, a dispute between neighbours, etc.[59] Very importantly, that fact pattern is assumed to arise across all legal orders under study. In that sense, one could brand the method 'functionalist', in that it looked at the law through the prism of how it fulfilled the function of dealing with a specific issue. Nevertheless, there is room to discuss whether Zweigert and Kötz's functionalism has anything to do with functionalism within the meaning of social sciences.[60]

Leaving aside whether the label 'functionalist' is proper, functionalism brought comparative law a significant step forward by instilling more rigour in the process of comparing. If and when the starting point for the comparison is truly common and external to the legal orders under comparison, then the comparatist knows that the comparison will be meaningful. The outcome of the exercise is a statement about the legal orders under comparison, as opposed to a reflection of a failure in the process of comparison. If and once the functionalist method is seen in that light – namely as an inquiry into legal orders from a common and external point of comparison – it should follow that the point of comparison need not be restricted to fact patterns, real or imaginary. Comparative legal research could also bear upon, for instance, how an EU directive was received in EU Member States, going of course beyond the mere legislative implementation – often perfunctory and formalistic – to include as well the 'digestion' of the changes brought about by the directive in administrative and legal practice.[61] A similar exercise could be conceived on the basis of international law commitments.

2.1.2. *Vantage point: from within national law to above national legal orders*

When it began, modern comparative law was carried out from a given national legal order: it was the study of 'foreign law', aiming at enriching the understanding of one's own system. In short, comparative law takes place from the inside looking out. Within each national legal order, the comparatists were inquisitive spirits who broke with predominant nationalism and ventured beyond the borders. As is known from discussions in Germany in the 19th century,[62] it was not immediately obvious to the various national legal communities that studying 'foreign' law was a valuable endeavour.

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[58] *Ibid.* at 34.

[59] Zweigert and Kötz themselves did not push their idea of standing outside of one's own system as far as to say that one should try to stand outside of the law. That step was taken by subsequent large-scale comparative law endeavours, such as the Common Core Project (see Mauro Bussani and Ugo Mattei, "The Common Core Approach to European Private Law" (1997-98) 3 Col. J Eur. L. 339) or the Ius Commune Casebooks Project (see Pierre Larouche, "Ius Commune Casebooks for the Common Law of Europe: Presentation, Progress, Rationale" (2000) 8 European Review of Private Law 101.

[60] See Michaels, *supra* note 53 at 343-363.

[61] For example, see the study of product liability and Directive 85/374 on product liability [1985] OJ L 210/29 in Walter van Gerven et al., *Tort Law* (Oxford: Hart Publishing, 2000) at 598 and ff.

[62] Zweigert and Kötz, *supra* note 49 at 53-54.

Progressively, comparative law scholars began to form an international community, which led them to take some distance from national legal communities. The perspective of comparative law then evolved, from the study of foreign law, towards the study of the various legal orders set next to another, i.e. a proper comparison of legal orders. Historically, authors point to the Paris Congress of Comparative Law in 1900 as the key moment in the emergence of this approach to comparative law as an exercise in classification and categorization of legal orders, with the aim of ascertaining their commonalities.[63] From there, it is only a small step to the idea of 'legal families', whereby legal orders are linked using concepts of parentage or filiation.[64] Since comparative law was primarily a European venture at the time, the distinction between common law and continental European (civil law) systems soon took center stage. It was further refined by sub-distinctions between, on the common law side, English and American families and, on the civil law side, Romanistic and Germanic families.[65] Non-Western legal orders[66] were always summarily dealt with, sometimes on the assumption that they were constructed under the influence of Western legal orders and could thus be analyzed by reference to Western systems. It is only in more recent times that non-Western legal orders were given a greater place in comparative law.[67]

Functionalism opens the path to go one step beyond and anchor comparative law not within national law, nor at the level of the various national legal orders, but above these systems. The latter are then viewed not so much as objects of comparison, but as concrete applications of a higher, more abstract corpus of knowledge about law. To some extent, this is no longer comparative law, in the sense of a comparison of legal orders (or *Rechtsvergleichung*, as the Germans put it), but rather a study of how this abstract corpus of knowledge about law manifests itself in the various national legal orders. For instance, knowing what options and choices are available in the design of liability law (including the degree of relevance of conduct, various conceptions of wrongfulness – if needed – and illegality, devices to limit the ambit of liability, etc.), one can study how different legal orders have made similar or different design choices and how this affects the quality of liability law.[68] Of course, the options and choices are not known *a priori*; they are identified either as result of a comparative study of the type described in the previous paragraph or otherwise (through economic analysis, for instance). Functionalism makes such a vantage point possible, yet at this point in time comparative law scholarship does not yet rise above national legal orders as a matter of course.

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[63] *Ibid.* at 59. It is no coincidence that this approach coalesced at the same time and in the same location as the Paris Exhibition of 1900.

[64] Legal families are central to 20th-century classical works such as Zweigert and Kötz, *ibid.*, Schlesinger, *supra* note 49 or René David, *Les grands systèmes de droit contemporains*, 11th ed. (Paris: Dalloz, 2002). This idea is still found in the current line of literature on 'legal origins', discussed *infra*, heading 3.6.1.

[65] As put forward by Zweigert and Kötz, *ibid.*

[66] We leave aside here the communist family of legal orders, which used to be treated separately but is now of mostly historical interest.

[67] See for instance the recent work of H. Patrick Glenn, *Legal Traditions of the World*, 4th ed. (Oxford: OUP, 2010). As long as comparative law focused on the formal law, mostly on legislation, the influence of the colonial era was unmistakable and it was possible to subsume non-Western systems under the main Western families. That assumption becomes untenable as soon as comparative law takes a broader perspective and looks at 'law in context', so that the specificities of non-Western legal traditions come much more strongly to the fore.

[68] Quality can be measured according to many parameters, be it efficiency, effectiveness, satisfaction of the parties, etc.: see *infra*, heading 3.4.

2.1.3. *Descriptive, analytical or normative*

In addition, comparative law scholarship also pursues many objectives. It is sometimes conceived of, or at least undertaken, as a descriptive venture, sometimes as an analytical endeavour, and sometimes even as a normative exercise.

Even if describing the state of the law within a given legal order may seem trite to other social sciences, it is never an easy task. The difficulty is compounded if the legal order in question is one with which the researcher and its readership are not entirely familiar, where the sources of law – formal and informal – might not be the same and where these sources are couched in another language. A significant part of comparative law scholarship is therefore concerned with describing the law of different legal orders.[69]

No description is ever entirely neutral, and thus even avowedly descriptive works always contain the seeds of analytical scholarship. Especially if the author is writing about a legal order where he or she is not at home, the process of description (and the translation, when necessary) will unavoidably impose some structure upon the legal order being described. From there on, especially when a functionalist approach is followed, it is only a small step to turn comparative law scholarship into an analytical endeavour. Legal orders are restated, they are set side by side for the purpose of comparing them and drawing conclusions as to similarities and differences. Still to this day, the stereotypical comparative law research project follows this pattern: on a given issue, 'national reports' are prepared on a series of legal orders, and a conclusion is then added, building upon these national reports.

Beyond that, comparative law scholarship could also pursue normative aims. In that case, building upon the analysis of a number of legal orders, normative conclusions are drawn. Typically, one legal order would be presented as superior or optimal, but normative conclusions can also be more nuanced (e.g. a combination of features from the systems under study would be preferable). Yet it has been noted that comparative legal scholarship tends to stay at the descriptive or analytical level.[70] As Michaels remarks, while functionalism improves the analytical quality of comparative law, by allowing for more robust comparisons to be made, it "provides surprisingly limited tools for evaluation".[71]

2.1.3. *Static or dynamic perspective*

Traditionally, comparative law takes a static perspective, comparing legal orders as they are at the point in time where the comparison is made. It might even be more accurate to characterize that perspective as atemporal; the law is compared as it is, without any specific time reference. Historical references are informative, meant to highlight how the law came to rest in the state it is reported to be. The traditional perspective is therefore also static in the sense that it assumes that the law is in a stable state. Comparative analysis would then return findings such as that the

[69] As Reimann, *supra* note 51 signals at 675-676.
[70] Ugo Mattei, *Comparative Law and Economics* (Ann Arbor: University of Michigan Press, 1997) at 97.
[71] Michaels, *supra* note 53 at 373-376.

law of jurisdiction X suffers from gaps on issue *a*, or that the law of jurisdiction Y is more developed as regards issue *b*.

Functionalism makes it possible to take a more dynamic perspective, which includes the evolution of legal orders over time. This opens the door to many interesting research questions, such as how legal orders reacted to an exogenous shock, the speed at which legal orders have dealt with certain issues, etc. Most significantly, a dynamic perspective allows the researcher to delve into the relationship between legal orders over time, to inquire into whether and how legal orders give and take to one another over time. Ultimately, this leads to the most tantalizing question, namely whether legal orders tend to converge over time or not.[72]

2.1.4. *Method or field*

Many of the earlier comparatists saw comparative law as a field of law or a sub-discipline of its own.[73] This view is certainly consistent with a vantage point anchored in a specific law ('comparative law from the inside looking out'). It would imply, for instance, that comparative law is presented as a separate topic in the legal curriculum, next to contract or property law, for instance. Comparative law is then a sub-discipline encompassing all the knowledge about foreign legal orders. Today, a number of comparative law scholars still see comparative law as a field.[74]

With the onset of functionalism, however, comparative law becomes more of a method than a field.[75] It is then not so much a body of knowledge than a way to attain knowledge, by comparing legal orders. Accordingly, there would be no room for a separate comparative law course in the legal curriculum, beyond teaching how to carry out comparative legal research (a non-obvious question, as will be seen below). Since it is a method, comparative law can in principle be applied to any legal research endeavour, irrespective of the research question. A weak version of this proposition would hold that any legal research can benefit from using the comparative method: even the most practical research questions – about the state of the law in a given system – can be better answered by placing the answer within a broader comparative context. A stronger version would go as far as to claim that any meaningful legal research must be carried using a comparative method:[76] academic legal research that refers to a single legal order only would be incomplete or superficial.

2.2. **The limits of functionalism**

Functionalism offers a solid method by which to venture outside of national law and take a vantage point among or even above legal orders. It also establishes a basis upon which to reach

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[72] Convergence can be measured in different ways: around an outcome, around substantive rules, etc.: see *infra*, headings 2.2.1. and 3.3.

[73] As was pointed out by Rudolf B. Schlesinger, *Comparative Law* (Mineola: Foundation Press, 1970) at 1, the English designation lends itself easily to this view, whereas the German one (*Rechtsvergleichung*) and to some extent the French one (*droit comparé*) point more in the direction of a method rather than a field of law.

[74] See Riemann, *supra*, note 51 or Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law (Part I)" (1991) 39 Am J Comp L 1 at 4-6.

[75] For instance, see the clear statement made at the outset of Schlesinger, *supra*, note 53 at 1.

[76] In addition to any other method which might be used, and in particular to inter-disciplinary methods such as law and economics.

valid analytical conclusions, while however not indicating how these could then feed into a normative analysis. It has become the standard method for comparative legal research, so much so that the methodological choice facing comparatists now is whether or not to espouse functionalism.[77]

Still, a number of comparatists are critical of functionalism – at least as expounded by Zweigert and Kötz. There are two broad lines of criticism.

2.2.1. *The* praesumptio similitudinis

The first one stems from what could be considered an overreach on the part of the two authors. In their *Introduction to Comparative Law*, they posit their '*praesumptio similitudinis*', namely that "different legal orders give the same or very similar solutions, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation".[78] They even go as far as to claim that[79]

> [T]he comparatist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same of similar practical results, but if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he has posed his original question were indeed purely functional, and whether he has spread the net of his researches quite wide enough.

It is worth noting that the authors do not frame their presumption in dynamic terms. Their claim is static: at any given point in time, different legal orders should evidence similar solutions to similar problems. Nonetheless, subsequent authors added a dynamic element to the presumption, thereby turning it into a so-called 'convergence hypothesis', which states that legal orders – at least those of EU Member States – are bound to converge over time.[80] The 'convergence hypothesis' provided the intellectual underpinning for much of the academic efforts to draft a European Civil Code, including the more concrete extension into a an academic Draft Common Frame of Reference.[81]

In reaction to the convergence hypothesis, some comparatists denied the possibility of convergence altogether, arguing that law was so steeped in culture that legal orders could not converge, or more precisely that any convergence claim is a mere pretense, papering over

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[77] Michiels, *supra*, note 53 at 340-343, who adds that functionalism has almost become synonymous with comparative law, and as such that its conceptualisation shows a significant amount of variation amongst authors. See also Maurice Adams and John Griffiths, "Against Comparative Method. Explaining Similarities and Differences", in Maurice Adams and Jacco Bomhoff, eds., *Practice and Theory in Comparative Law* (Cambridge: CUP, 2102), to be published.

[78] Zweigert and Kötz, *supra* note 49 at 39. A similar idea underpins the work of Schlesinger, *supra* note 53 at 30-35.

[79] *Ibid*. at 40.

[80] Indeed, in the introduction to Christian von Bar et al., *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, Outline Edition (Munich: Sellier European Law Publishers, 2009), the authors write, regarding the private laws of Europe, that the purpose of the DCFR is to "sharpen the awareness of the existence of a European private law and also […] to demonstrate the relatively small number of cases in which the different legal systems produce substantially different answers to common problems." (at 7).

[81] *Ibid.*

irreconcilable differences.[82] Leaving aside how culture is so reductively articulated solely along national lines, this line of argument, pushed to its limits, leads to a nihilist dead-end. Ultimately, no comparative law would be possible. Suffice to say that, under a veneer of humanist eclectism, this line of argument vastly exaggerates the significance of law. By ignoring that national laws can also evolve towards one another if the political or economic situation so dictates, this scholarship contradicts its own call for comparatists to pay more attention to the broader social context against which national laws play out. While law surely cannot be seen without reference to that broader context, the influence of that context can go in both directions: keeping national legal orders autonomous or bringing them closer together.

In the end, that criticism would have been more successful if it had been less radical, for it does point to a weakness of functionalism.[83] For all the rigour it brought to comparative law, functionalism remains an essentially legal, mono-disciplinary method. It can improve the quality of comparative legal research by broadening the inquiry beyond positive law, to include outcomes (the way in which law is applied to reach a given result in dealing with the issue under study) and, by the same token, other means than positive law, through which an outcome can be reached.[84] The scope of inquiry is extended to facts and to the grey zone between positive law and facts, but somehow what is above the law – i.e. higher fundamental principles and policy choices – remains outside of the inquiry. This shortcoming can perhaps be attributed to the piecemeal nature of functionalism, investigating each legal order as it does, from the point of view of a narrow, exogenous starting point. In that sense, functionalism was faulted for failing to see the forest for the trees, for obscuring the *génie* of legal orders through a micro approach.[85] Yet Zweigert and Kötz advocated that the comparatist 'avoid all limitations and restraints';[86] surely this also implies that the comparatist should be free to venture beyond and behind the law to look at the underpinning principles and policy choices. It seems more likely that the failure to include principles and policy choices within functionalist inquiries stems from the still prevalent propensity of private lawyers to believe that law – read private law – is free from such principles and policy choices.[87] If law was only about finding the 'right' rule for a given case, then perhaps one could expect a *praesumptio similitudinis.*

The *praesumptio similitudinis* ignores that legal orders can very well settle on different solutions. In an earlier piece,[88] my co-author and I put forward three main explanations for divergence between legal orders.

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[82] The most vocal and radical proponent of that line of criticism remains undoubtedly Pierre Legrand. See for instance his piece "European Legal Systems are Not Converging" (1996) 45 Int'l & Comp. L.Q. 52.
[83] See also Michaels, *supra* note 53 at 369-372.
[84] Including not just other areas of law than the one which the researcher would spontaneously consider, but also devices perceived as non-legal, such as soft law instruments, customs, etc.
[85] To borrow the terminology used by Zweigert and Kötz, *supra* note 49 at 4-5.
[86] *Ibid.* at 35.
[87] As noted in Filomena Chirico et al., "Conclusion", in Pierre Larouche and Filomena Chirico, eds., *Economic Analysis of the ECFR* (Munich: Sellier European Law Publishing, 2010) 319 at 331, referring to Martijn W. Hesselink, "The Politics of a European Civil Code", in Martijn W. Hesselink, ed., *The Politics of a European Civil Code* (The Hague: Kluwer Law International, 2006) 143. Indeed, as Michaels, *supra* note 53 at 364-65 points out, functionalism does not need to be rule-centred.
[88] Chirico and Larouche, *supra* note 1 at 466-471.

First of all, different policy preferences can prevail within different jurisdictions, leading to different solutions. State A prefers to ensure that victims are fully compensated, while State B is ready to accept less compensation for victims, for the sake of reducing the cost of compensation schemes. Accordingly, their liability laws might differ. This is the classical local preference phenomenon, well known in economic literature.

Secondly, differences might stem from less explicit choices, which were influenced by information imperfections or by previous choices, via phenomena associated with network effects, such as tipping or path dependency.[89]

Thirdly, differences might reflect the will of vested interests (including the local legal community), which are served by the current state of the law and oppose any change.[90]

These three explanations cannot be treated in the same fashion: local preferences should be respected unless there are good reasons not to do so, information imperfections or network effects must be factored in, but may not deserve the same respect as local preferences, and finally vested interests should be exposed for what they are. Of course, it is difficult to identify which of the three explanations prevails in a given case. Brushing them all under the carpet of 'legal culture', however, is of no help at all: 'legal culture' cannot be invoked to prevent a thorough investigation of the reasons why a legal order became as it is.

2.2.2. *The lack of inter-disciplinarity*

A second line of criticism against functionalism is more recent and more fruitful, coming from inter-disciplinary scholarship.[91] Here as well, functionalism is faulted for a shortcoming, for a failure by its proponents to embrace the full implications of their method. This time, the shortcoming lies not in the scope of inquiry, but in the formulation of the starting point. While the requirement to find an exogenous starting point marks a progress, functionalist theory does not otherwise specify how that starting point is to be found.[92] Presumably, the researcher is trusted to be able to correctly identify an exogenous starting point. Common sense and everyday experience can only reach so far: yes, car accidents happen in every developed country, but cars are not used under the same circumstances everywhere. There is no convincing argument to support the presumption that a researcher can identify a starting point, as the critics point out. Since that starting point is meant to be exogenous to law as much as possible, in all likelihood law and legal theory will be of limited help. The critics suggest using other social sciences in order to have a more robust method of identifying a proper starting point.[93] One can argue

[89] See also Ugo Mattei, "The Issue of European Civil Codification and Legal Scholarship: Biases, Strategies and Developments" (1997-1998) 21 Hastings Int'l & Comp L Rev 883. As pointed out by Alan Watson, "Legal Change: Sources of Law and Legal Culture" (1982-1983) 131 U Pa L Rev 1121 at 1134-1146, the law is often dysfunctional, i.e. in conflict with the interests of society or its leaders (referring to his book *Society and Legal Change* (Edinburgh: Scottish Academic Press, 1977)).

[90] This point is well expounded in Anthony Ogus, "The Economic Basis of Legal Culture: Networks and Monopolization" (2002) 22 Ox J Leg St 419.

[91] See Julie De Coninck, "The Functional Method of Comparative Law: *Quo Vadis?*" (2010) 74 RabelsZ 318.

[92] See also Michaels, *supra*, note 53 at 367-369.

[93] For instance, De Coninck, *supra* note 91, illustrates her argument by using behavioural economics to find the starting point for her comparative research.

whether this criticism is really a fundamental repudiation of functionalism or rather a call to develop functionalism further and devote more attention to how the starting point is determined.

2.2.3. *Conclusion*

In the end, despite the undeniable advances made in comparative law over the last decades,[94] especially with the development of the functionalist method, the two lines of criticism just discussed do expose the limitations of comparative law as it is conducted now.

First of all, comparative law remains for all intents and purposes a mono-disciplinary, legal pursuit. It is carried out by legal scholars and for other legal scholars. Especially when it comes to private law, comparative law remains impervious to the principles and policy underpinning the law, which are typically emanating outside of the law (from political processes or socio-economic realities). It is still too focused on rules, as major recent exercises such as the DCFR show. Even if its scope of inquiry, when a functionalist method is used, extends beyond positive law, comparative law pays little regard to other social sciences.

Secondly and consequently, unless one is satisfied with the *praesumptio similitudinis* or with the incommensurability of 'legal cultures', comparative law lacks a dynamic dimension. It does not offer a satisfactory account of how the relationship between legal orders evolves over time.[95]

Thirdly and again as a consequence of the previous points, because comparative law remains mostly mono-disciplinary and static, its purpose is fuzzy, at best. It can certainly serve to enlighten and educate lawyers, but the issue remains what comparative law can achieve beyond the confines of the legal academic community. While comparatists typically state that their discipline serves to support the legislative power and to help the judiciary in interpreting the law, no convincing theory has yet been put forward as to how comparative law can achieve these purposes despite its mono-disciplinarity and its staticness.

3. LEGAL EMULATION

3.1. Beyond regulatory competition or comparative law: the literature

In recent years, a number of authors, in the regulatory competition literature and comparative law scholarship, pointed to the shortcomings identified above and attempted to overcome them.

Following their review of the regulatory competition literature, set out above, Esty and Geradin add another line of criticism, this time touching not so much a limitation of the regulatory competition model, but rather a lack of complexity and ambition. The two authors fault regulatory competition for entertaining "too narrow a set of competitors". It is implicit in their view that regulatory competition models are overly inspired by US institutions. Indeed as pointed out before, Tiebout wrote his article in order to show that the 'tragedy of the commons' would be averted through regulatory competition amongst local authorities (as opposed to a single central

[94] As chronicled in Riemann, *supra* note 51.
[95] Schlesinger, *supra*, note 53 offers a good account of migration of legal ideas at 8-14, and hints at dynamic explanations at 28, without developing this point much further.

authority). What is more, the Easterbrook, Chicago-school version of regulatory competition has an obvious US constitutional undertone, since it is used to argue in favour of State-level against federal-level jurisdiction.[96] This relatively simple choice between, on the one hand, a federal-level intervention, unitary and uniform across space and time, and, on the other hand, regulatory competition at State level, might correctly render US constitutional processes, but it cannot necessarily be extended outside of the USA. Esty and Geradin argue that competition also takes place between the various levels of a federal (or multi-level) structure, between the various entities making up the State,[97] and between the State and non-State actors (such as NGOs).[98] This leads them to formulate a model of 'regulatory co-opetition', which combines competitive and cooperative relationships at the inter-governmental, intra-governmental and extra-governmental level. They claim that this model is more appropriate to describe the reality of, among others, the EU, the transatlantic relationship or the WTO.

By introducing institutional elements in the model, Esty and Geradin move away from the exogeneity and the resulting passivity of legal actors, which characterizes regulatory competition. Similarly, Claudio Radaelli criticizes the regulatory competition models for their lack of institutional dimension.[99] Beyond competitive races to the bottom or top, Radaelli introduces the concept of 'sideways races' or policy transfers, where jurisdictions actively seek to learn from each other.[100] This concept can also be found in Gabor (as 'yardstick' regulatory competition).[101] Neither Radaelli nor Gabor fully fleshes out those concepts. Their writings point in the direction of the legal emulation model, which is developed in greater detail here.

In the comparative law and economics literature, a number of authors have sought to bring insights from law and economics into the discussion. Ugo Mattei noted that in the literature on legal transplants, which seeks to provide an account of how law is carried over from one legal order to the other, even leading authors such as Watson or Sacco do not seek to answer the question why such legal transplants occur.[102] They are content to rely on inchoate concepts such as prestige: the law from the most prestigious legal order would be taken over by others.[103] In contrast, law and economics offers a cogent explanation for legal transplants. Typically, law and economics scholars – now strengthened by the Law and Finance literature – argue that the common law is taken over by other systems because it is more efficient.[104] As Mattei remarks, 'efficiency' is not defined that precisely in the literature, and here comparative law can in return contribute to a better understanding of the grounds which lead to a finding that a given legal

[96] Although in the piece referred to *supra* note 10, Easterbrook ends up arguing for a moderate form of federal intervention via a revised State action doctrine under the Sherman Act.
[97] I.e. between the branches of government, but perhaps more even between departments within one of the branches of government, namely the executive.
[98] These other competitive relationships are also present in the USA.
[99] Radaelli, *supra* note 9 at 5, 7.
[100] Ibid. at 10-12 and 16-18.
[101] Gabor, *supra* note 11 at 15-17, 23-24.
[102] In "Comparative Law and Legal Change" (1978) 37 Cambridge LJ 313, Alan Watson does put forward a theory of legal change, but it does not seem to be picked up by other authors. In "Legal Formants: A Dynamic Approach to Comparative Law (Part II)" (1991) 39 Am J Comp L 343, Sacco ventures his theory of why legal systems change (at 397 and ff.). In his view, it comes down to imposition or prestige.
[103] Ugo Mattei, "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics" (1994) 14 Int'l Rev. L. Econ. 3 at 4. See also Mattei, *supra*, note 70 at 123 and ff.
[104] *Ibid.* at 5.

order is more efficient on a given issue. Similarly, comparative law can better explain why, despite the efficiency justification, some legal transplants fail.[105]

Ogus, alone and with Garoupa, took this reasoning further. In a first piece,[106] Ogus put forward a distinction between facilitative law and interventionist law. The former is the law which aims to foster mutually desired outcomes as between parties, typically contract law, corporate law, etc., where the preferences of the parties can be expected to be reasonably uniform across legal orders. The latter comprises the law that seeks to protect one party or one public interest as against the will of other parties, for instance tort law, regulation, etc., where the law is more likely to reflect local preferences.[107] Ogus surmises that interplay between legal orders can lead to convergence in the case of facilitative law, but is unlikely to do so in the case of interventionist law.

In a later piece with Garoupa,[108] the authors investigate further the incentives for convergence. They make a simple two-jurisdiction model, where each jurisdiction may or may not want to change their law by taking inspiration from other jurisdictions. There are thus four possibilities: both jurisdictions might want to change, only one of them might do so (and then either *A* or *B*), or none of them does. There is a payoff for change, in the form of increased ability to trade with other jurisdictions, but it is bound with cost, in order to absorb the new law.[109] If both jurisdictions change to an agreed state of the law, they both reap the benefits and incur some cost. If only one jurisdiction changes to the law of the other, both reap the benefits, but only the first one bears costs. Finally, if no jurisdiction changes its law, then both reap no benefits but incur no costs either.

The authors model this as a non-cooperative game.[110] The outcome of the game will depend on the size of the costs of changing one's legal order relative to the benefits. If the cost to each jurisdictions is high relative to the benefits, no change will occur. If there is an imbalance, i.e. one jurisdiction faces a low cost relative to the benefit and the other, a high cost, then the low-cost jurisdiction will adopt the law of the high-cost jurisdiction. This is the case of a legal transplant, with one origin and one transplant jurisdiction. If the costs to each jurisdiction are relatively low compared to the benefits, then the two jurisdictions might enter into a Chicken game, where each hopes that the other will make the first move, with the ensuing risk that no one moves.

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[105] *Ibid.* at 18-19.

[106] Anthony Ogus, "Competition between National Legal Systems. A Contribution for Economic Analysis to Comparative Law" (1999) 48 Int'l Comp. L. Q. 405.

[107] The distinction between facilitative and interventionist law seems to run along the same lines as the civil law distinction between suppletive and imperative law (typically found in contract law, especially), albeit for different reasons.

[108] Anthony Ogus and Nuno Garoupa, "A Strategic Interpretation of Legal Transplants" (2006) 35 J. Leg. St. 339.

[109] The range of costs envisaged by the authors is quite broad and complete, including (i) the cost of learning the new law to be introduced, (ii) rent-seeking by entrenched interests, (iii) loss of consistency in the receiving legal order as a consequence of the change, (iv) private adjustment costs and (v) loss of innovativeness flowing from the removal of variation: *ibid.* at 345-46.

[110] *Ibid.* at 346-48.

Ogus and Garoupa then consider whether the Nash-equilibrium outcomes of the game are also welfare-maximizing (Pareto-efficient), or whether some intervention might be required to correct the outcome. They conclude that intervention might be warranted, either because of a discrepancy in the division of costs and benefits as between the two jurisdictions (positive externality) or because the free-riding inherent in the Chicken game prevents the optimal outcome from being reached.[111] Of course, the authors caution against the risk of government failure, because of an inaccurate assessment of the situation or a failure to take into account private efforts (leading to duplicative waste).

With their work, Ogus and Garoupa shed more light on why legal orders might or might not move towards one another. In particular, as compared to the traditional regulatory competition literature, they take a more realistic view of the process of changing the law, by factoring in a realistic assessment of the costs associated with changes. Nevertheless, they retain some element of the exogenous vision of law which characterizes regulatory competition: the assumption is that legal orders are changed in the sole hope of increasing welfare through trade,[112] and the actual content of the law is not so material.

3.2. **Legal emulation**

At the risk of oversimplification, the result of the foregoing discussion of regulatory competition and competition could be summed up in the following table.

	Regulatory competition	**Comparative law**
Nature	*Model*	*Academic exercise*
Purpose	Describe reality	Uncertain beyond legal education
Limitations	Limitative assumptions (no externalities, perfect information, mobility, responsive authorities)	No limitations
	Counter-indications (economies of scale, transaction costs, strategic behavior)	
	Law must be essential to firm decisions and impact isolated	
Theoretical vision	Law as rules (including interpretation and implementation)	Goes beyond rules to include outcomes
	Substance of law immaterial	Policy context ignored
	Multi-disciplinary (without much law)	Mono-disciplinary
Driver	*Exogenous* Driven by non-legal actors, outside of the law	*Endogenous* Carried out by legal community
	Legal community passive	Non-legal actors irrelevant
Time dimension	Dynamic model	Static model, lacks solid dynamic account

[111] *Ibid.* at 348-53.
[112] *Ibid.* at 345.

Legal emulation provides a model for the interaction between legal orders which would combine the strengths, and if possible remedy the weaknesses, of regulatory competition and comparative law. Accordingly, this account should:

- have a purpose going beyond the legal community, i.e. be applicable to real situations, but without suffering from so many limitations as regulatory competition;
- be based on theoretical vision that includes a richer understanding of law than regulatory competition, while opening up to the policy context and avoiding the mono-disciplinarity of comparative law;
- be primarily driven within the law by the legal community, or at least allow the legal community to play a central role;
- have a well-developed dynamic dimension, i.e. be able to explain the evolution of legal orders over time.

Legal emulation starts from the observation that, within legal orders, one finds an increasing number of instances where interaction between legal orders is a direct consequence of the legal order (at least potentially, if not in reality). In other words, the impetus for interaction is *endogenous*. In comparison, regulatory competition models assume that outside pressure (from market actors) drives the interaction between legal orders, and that the legal community reacts to such pressure. Some of these instances are surveyed further below, including constitutional and EU review, impact assessment exercises or networks of authorities. One might ask whether these are not just isolated instances, or whether a broader principle can help to explain them. In my view, they all reflect a concern with the quality of the law, which can be associated with good governance. The more law achieves its objectives and the less expense and disruption it generates in so doing, the better its quality. Such a principle of quality has not yet reached the status of hard law, although it is starting to be relatively widespread throughout legal orders. For instance, the EU Treaty contains a generally applicable proportionality principle at Article 5(4), which covers much the same ground as the quality principle discussed here.[113]

Based on that concern for the quality of the law, legal emulation involves a number of concrete steps, which are formulated in very general terms in the following paragraphs.

First of all, the framework of reference for the inquiry must be fixed. As a starting point, one must know what is the object of the inquiry (here the functionalist method is useful): which issue is to be examined? Next to that, the normative standard for assessment must also be known. Which criteria will be used to look at legal orders and compare them? As is explained in greater detail further below, in order to set the normative standard, account must be taken of the objectives that the law should fulfil on the issue in question and of substantive and institutional constraints that may exist outside of the issue in question.

Secondly, against that framework of reference, a number of legal orders are analysed, to see how they deal with the issue at stake. Typically, the number of legal orders to be analysed does not need to be so high, since there might not be so many different options as to how to deal with the

[113] For a representative application of Article 5 TEU (formerly Article 5 EU), see ECJ, 8 June 2010, Case C-58/08, *Vodafone (Roaming Regulation)* [2010] ECR I-4999, at par. 51-71. For a sharper application of proportionality (without expressly framing the reasoning in such terms), see ECJ, 24 November 2011, Case C-70/10, *Scarlet*, nyr.

issue at stake. At the end of this step, a number of choices (each with a number of options to be chosen from) are identified and articulated.

Thirdly, the options identified in the second step are compared, on the basis of the normative standard set out in the first step. Depending on how well-defined the normative standard is, the result might be a strict ranking amongst the options (a sort of benchmarking exercise) or a relative ordering, depending on certain trade-offs to be made.

Fourthly, a conclusion is drawn and, as the case may be, changes are brought to the legal order(s) in question.

If the exercise is a one-shot operation, it can already lead to some interaction between legal orders. If it is repeated at regular intervals or within a number of legal orders, the dynamic effects can be much more significant.

The next headings elaborate on two aspects of legal emulation, in order to explain better how it meets the requirements set out above for improving over regulatory competition or comparative law.

3.3. **Theoretical perspective: the tree metaphor and law as choice**

Legal emulation rests on a specific theoretical view of law, where the emphasis is not so much on the actual state of the law (the rules as they may be), but on the law as it is, could be and might have been. The positive law of any jurisdiction is the outcome of a series of choices, and legal science is the study of the law as a set of possible options and of choices to be made between these.

By way of metaphor, we could think of legal orders as a group of trees (oak trees, for instance), where each legal order is a tree. On a nice summer day, these trees will appear to have similar shapes, covered in leaves. The trees are next to each other, of the same species and face the same environment and weather. Accordingly, they are bound to look alike from the outside. At the same time, when looking under the foliage, it is immediately clear that no single tree is like the other. Their branches grew along different paths, even if they seem to fill similar volumes and support similar leaf covers.

So it is that the law in each jurisdiction needs to deal with a number of social, economic and political issues, which show some variation from one jurisdiction to another, but not that much (certainly amongst developed countries). In dealing with these issues, there are only a few reasonable outcomes.[114] This the leaf canopy in the metaphor.

In order to arrive at those outcomes, however, a number of explicit or implicit choices have been made: these correspond to the branches of the tree in the metaphor. These choices relate to each other, just like the shape of the lowest forks influences how the upper branches will develop. No

[114] Hence the quick decrease in marginal utility when piling up country reports, in large-scale comparative law efforts. For instance, in the 27-member EU, it is hard to imagine that a given issue would be dealt with in 27 equally different and relevant ways.

tree is exactly like another, and indeed no two legal orders are identical. Each legal order would then be a function of a set of interrelated choices, some of which have a fundamental influence on others. Legal science investigates the total set of interrelated choices (i.e. the tree structure that would result if all trees were considered together), and legal emulation rests upon that set.

Amongst these choices, some distinctions can be drawn. Some choices concern the substance of the law: what should be the conditions for contracts to be formed? What should be the conditions for liability to occur? Other choices rather bear on institutions: Who sets the law? Who implements and enforces it? How?

The substantive choices are often referred to as policy choices, since they usually involve compromises between various objectives, such as legal certainty, welfare, growth, efficiency, equality or fairness. In contemporary democracies, these choices are made through democratic processes, either primary or delegated. Some of these choices are so central and have become so entrenched that they are considered established principles, such as democracy itself or the protection of fundamental rights.[115] Without wanting to elaborate at length on this, these substantive choices are typically not those that lawyers can claim to master on their own: this is the realm of policy, where other sciences can provide much useful information to guide choices. Based on this theoretical perspective, legal emulation thus makes more room for other disciplines to be considered than comparative law.

In contrast, lawyers are often expert and competent for making institutional choices, which are largely reflected in the legal order. In that sense, law is an applied endeavour, which translates substantive choices into a normative realm, incorporated in the relevant institutions. Some of these choices are very ancient, such as for instance the balance of power between legislative organs, the judiciary and the academia, in the development of law, where differences can be observed both over time and between English, French or German law, for instance. Because of how deeply imbedded these choices are, it is tempting to present them as an immutable feature of a given 'legal culture'. Yet such deep imbeddedness should rather be seen as a challenge for the researcher, in that the choices are harder to ascertain and explain (especially if they have been made over a longer period of time, in small incremental steps). Upon proper examination, one can often find evidence of the choice, in that different options are put forward[116] and a decision is more or less explicitly made between them. As a consequence, even such deep-seated choices can be changed if necessary; no choice is immutable. 'Legal culture' can best be pictured as the legacy of choices past, which can of course create strong path dependency.[117] Going beyond that to endow 'legal culture' with eternal and incommensurable properties is not appropriate.

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[115] These principles can also be seen as objectives in and of themselves, which have however acquired a higher status such that trade-offs involving these objectives are not carried out in the same fashion as trade-offs between 'ordinary' objectives. For the purposes of this article, the issue can be left open.

[116] It always comes as a surprise to a researcher to find, within a given legal order, ancient traces of options which were not chosen, which correspond to the chosen options in other legal orders. In general, most options are presented in most legal orders: differences arise from the choices made, not from the options available. A similar point is made by Sacco, *supra* note 74 at 21-24, where he insists that legal systems contain 'legal formants' which point in different directions.

[117] In that sense, the concept of legal culture put forward by Watson (see *supra*, note 89 at 1151-1157 for example) is much more fruitful than that of Legrand. See also Michaels, *supra* note 53 at 365.

Substantive and institutional choices are not hermetic categories. In fact, they mix and interact. Some choices can be framed as either substantive or institutional, for instance whether to qualify a question as fact or law. More importantly, some of the fundamental institutional choices discussed above may have a bearing on substantive choices. For example, creating a new regime of compensation might be easier if there is already a set of institutions and procedures to handle that regime, as opposed to a situation where institutions and procedures must be created anew.

In the end, legal emulation can best be understood against the background of the tree metaphor, as explained above. Legal emulation treats legal orders as the outcome of a series of choices, substantive and institutional, fundamental or more fleeting, and allows for dialogue and interaction between the orders against the background of those choices.

3.4. **The policy dimension**

Seen against the background of that theoretical perspective, legal emulation fills a gap in both regulatory competition and comparative law, regarding policy. It will be recalled that regulatory competition takes an external perspective on law. Efficiency is seen as the driving force for changes in legal orders. Yet unless efficiency is taken to be an end in itself, regulatory competition literature does not and cannot explain how efficiency is measured. Presumably regulatory competition aims to promote the most efficient rule from the perspective of the interests of the market players which are 'voting with their feet', but that is not a satisfactory account from a welfare perspective.[118] Similarly, we saw that comparative law – even using a functionalist method – does not sufficiently take policy choices into account, if at all. This is how Zweigert and Kötz could come to their *praesumptio similitudinis*.

The legal emulation model factors in the policy choices that regulatory competition and comparative law leave outside. By the same token, it gives a stronger account of the purpose of comparison. Why would a legal order be perceived as preferable to another? The theoretical perspective sketched above does not answer that question in the abstract, but it offers a way to produce a credible and sound answer to that question. Indeed, it can be argued that the normative standard by which legal orders are measured is a function of which of the choices (from the whole set of choices) are held constant for the purposes of the assessment, and which ones are actually submitted to the assessment. By way of illustration, let us look at product liability. At the highest level of generality, one could for instance assume merely the most general choices made regarding liability – that liability law exists, that compensation is an objective and that the cost-benefit ratio of a compensation system should be optimized – and conduct an inquiry into the best way to deal with end-user damage caused by industrial products. In that inquiry, presumably, relying on the general law of liability without having a specific regime would be one of the options. The assessment could also be more specifically framed, assuming for instance that specific product liability regime is desirable.[119] The issue would then be which specific product liability regime performs best in the light of the choices held constant. In that case, legal

[118] As mentioned *supra*, note 38, the regulatory competition literature ignores the 'local' externalities potentially caused by firm-level decisions upon other market players and other members of society. Even if the conditions for the model to work are met, the authorities could thus receive signals that are distorted by externalities.

[119] Therefore bringing the choice 'specific regime or not' out of the purview of the inquiry and into the range of choices held constant.

orders where no specific product liability regime has been put into place[120] would either have to be left out or would have to be studied in a specific way, to take into account how the inquiry is framed. The assessment could be even more specifically framed, by removing yet another choice from the inquiry, if for example one would assume that a fault-based regime is not an option.

Accordingly, the normative standard of assessment would be which legal order performs best, within the range of choices that are not held constant for the purposes of the inquiry. Against that background, regulatory competition could be thought of as a relatively extreme case where the only constant choices would be efficiency and the unstated preferences of the non-legal actors whose behaviour creates pressure for change. A functional comparative analysis could be conceived of as a case where all fundamental substantive policy choices are deemed to be constant,[121] and only the more ancillary substantive choices[122] and the institutional choices are at stake.

Legal emulation can apply in both practical and academic settings. In practice, the set of constant choices is likely to be larger, resulting in a more focused inquiry. Furthermore, the issue might be formulated by a reference to a specific legal order, i.e. do other legal orders offer a better solution to the issue in question? In a more academic setting, fewer choices are constant, and the inquiry would be formulated more generally, i.e. which is the best solution or what are the trade-offs involved? This makes the inquiry more challenging, but perhaps also less immediately applicable.

3.5. **Endogenous pressures to change the law**

As mentioned above, there are a number of examples of endogenous pressures, within legal orders, which can lead to changes in the law in the light of other legal orders. These are usually ignored by regulatory competition as well as comparative law.

3.5.1. *Constitutional, EU and human rights review*

First of all, over the past decades, judicial review has been introduced in European legal orders. It comes from a number of angles. Most European constitutions now allow constitutional review, whereby national law is measured against constitutional provisions concerning basic democratic principles, human rights or federalism (where applicable). In addition, the European Court of Human Rights also reviews national law against the human rights guarantees of the ECHR. Moreover, the European Court of Justice can also assess the conformity of Member State law with EU law, especially with provisions concerning the internal market or fundamental rights.[123] It is not the purpose of this paper to chronicle the various means of judicial review available across Europe; what they have in common, however, is the principle of proportionality. That principle implies – among other things – an inquiry into whether the impugned measure represents the best compromise between the achievement of the aim pursued and the

[120] Either legislatively or judicially.
[121] Which happens less frequently than comparatists would like to believe.
[122] Such as the choice of legal criteria or the formulation of legal definitions.
[123] The ECJ can also review the conformity of EU law with the Treaties and fundamental rights guarantees, now enshrined in the EU Charter of Fundamental Rights.

constitutional or EU law guarantees which are at stake.[124] In order to carry out this part of the proportionality test, one natural avenue is to look at how other legal orders are dealing with the same issue. Presumably, other legal orders will show a range of solutions, within which the impugned measure can be situated, with a view to establishing whether it is an outlier compared to others. Proportionality tests are especially prevalent in the EU – where they feature in national, EU and ECHR review regimes – but they are also present in other legal orders.[125]

By way of illustration, construing EU review as an instance of legal emulation can help shed light on recent controversial rulings of the ECJ regarding the principle of proportionality, including *Commission* v. *Italy (motorcycle trailers).*[126] The ECJ faced criticism for holding that "[s]ince that degree of protection may vary from one Member State to the other, Member States must be allowed a margin of appreciation and, consequently, the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate".[127] The ECJ indicates that it considers that the degree of protection should be left outside of the inquiry, i.e. that it should be one of the constant choices. However, as the ECJ itself adds, Member States do not seem to agree on the appropriate level of protection. Accordingly, it is impossible for legal emulation to take place on the ECJ's terms, since the level of protection varies, yet it is not part of the scope of inquiry. A preferable alternative formulation might have been to put the level of protection within the scope of inquiry, while holding the policy objectives (free movement of goods, safety of road users) constant. At the same time the test could have been formulated more loosely, in the sense that the proportionality test would not require the least limitative measure, but rather a measure that falls within a set of reasonable measures whereby a trade-off is made between these objectives. This would have left room for a finding, for instance, that the measure at stake was too one-sided in favour of one objective.[128]

3.5.2. *Impact assessment*

Secondly, also in the last decades, impact assessment was introduced in most legal orders.[129] Typically, impact assessment is found by way of *ex ante* assessment of new legislative or regulatory proposals. Such assessment must be carried out by the proponent of the new legislation or regulation, or by an independent unit, and tabled with the proposal. A similar exercise can be carried out as well when legislative measures are subject to a review or sunset clause.[130] Furthermore, at the administrative level, review exercises in the nature of impact

[124] This is often referred to as the 'minimal impairment' test. Some significant variation can be observed, however, as to how strictly the test is carried out, i.e. whether the measure in question must truly be the least restrictive of all possible measure, or whether it must simply strike a reasonable compromise.
[125] For instance, in the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, 1982, c. 11, Article 1.
[126] ECJ, 10 February 2009, Case C-110/05, *Commission* v. *Italy* [2009] ECR I-519.
[127] *Ibid.* at 65.
[128] As was done recently in *Scarlet*, *supra*, note 113.
[129] See Anne Meuwese, *Impact Assessment in EU Lawmaking* (The Hague: Kluwer Law International, 2008) and Jonathan Verschuuren, ed., *The Impact of Legislation* (Leiden: Martinus Nijhoff, 2009).
[130] It depends on the extent of the review that the clause mandates. The review can be limited to measuring the effectiveness of the measure under review within the legal order in question (i.e. were the objectives achieved? did the measure work?), or it can be more ambitious, extending also to a comparison of the effects of the measure with those of comparable measures in other jurisdictions. In the latter case, such review comes very close to an *ex ante* impact assessment, for the purposes of this paper.

assessments are also carried out in some systems, with a view to improve the quality of administrative action.[131] Impact assessments usually comprise the following steps:[132] (i) identify the problem giving rise to the proposal, (ii) define the objectives to be attained, (iii) develop the main policy options, (iv) analyse their respective impact and (v) compare the options. By and large, therefore, impact assessments follow the structure of legal emulation. In the light thereof, it is surprising to find that, in a representative sample of regulatory impact assessments carried out at EU level, very few seem to make comparisons between the legal orders of EU Member States in the course of identifying policy options.[133] Apparently, that work is left to officials and consultants who primarily use non-legal sources to identify those options, thereby ignoring the useful information coming from the rich experience of Member States' legal orders.

3.5.3. *Networks of authorities*

Thirdly, a more recent development in the EU also evidences internal pressures to orient the development of the law by reference to other legal orders. In a number of areas, typically concerning economic regulation and involving EU-level frameworks to be implemented or applied by Member States, the authorities of the Member States have regrouped into networks. These networks have generally come into existence on the authorities' own motion, and they have often then been formalized at EU level.[134] They exist in the areas of competition law,[135] financial services regulation,[136] electronic communications regulation,[137] energy regulation,[138]

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[131] C.f. the *beleidsdoorlichting* exercise in the Netherlands.

[132] European Commission, *Impact Assessment Guidelines*, SEC(2005) 791 (15 June 2005). For the purposes of this paper, the newer *Impact Assessment Guidelines*, SEC(2009) 92 (15 January 2009) will be used (see pp. 21 et seq.). They do not differ from the 2005 Guidelines as far as the scope of this paper is concerned.

[133] See the results of the study carried out by M. Angela Noguera, "Methodology of impact assessments in the EU", in P. Cserne and P. Larouche, eds., *Convergence and Divergence of National Legal Systems* (The Hague: Asser Press, forthcoming 2012).

[134] Formalization at EU level is typically fraught with tensions, since the authorities which originated the network tend to resist what they perceive as a takeover by the EU institutions.

[135] The European Competition Network (ECN) regroups the Commission and all national competition authorities (NCAs) from the Member States. It is the forum for cooperation between the Commission and the NCAs pursuant to Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] [2003] OJ L 1/1. It finds its basis in a Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, attached to Regulation 1/2003, as well as a Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43. Prior to the creation of the ECN, the authorities had already launched an International Competition Network (ICN) out of their own motion: see www.internationalcompetitionnetwork.org.

[136] Following the 2010 reform, a European Supervisory Authority has now been put in place, comprising a European Banking Authority (Regulation 1093/2010 [2010] OJ L 331/12), a European Insurance and Occupational Pensions Authority Regulation (Regulation 1094/2010 [2010] OJ L 331/48) and a European Securities and Markets Authority (Regulation 1095/2010 [2010] OJ L 331/84). These authorities bring together the respective supervisory authorities of the Member States.

[137] After the national regulatory authorities (NRAs) for electronic communications formed the Independent Regulators Group (IRG) in 1997 (www.irg.eu), the Commission created a European Regulators Group for Electronic Communications Networks and Services (ERG) by Decision 2002/627 [2002] OJ L 200/48. Following the reform of the regulatory framework in 2009, the ERG was replaced by the Body of European Regulators for Electronic Communications (BEREC), as created by Regulation 1211/2009 [2009] OJ L 337/1.

[138] In 2003, the Commission created the European Regulators Group for Energy and Gas (ERGEG), through Decision 2003/796 [2003] OJ L 296/34. Following the reform of the regulatory framework in 2009, the ERGEG was replaced by the Agency for the Cooperation of Energy Regulators (ACER), created by Regulation 713/2009 [2009] OJ L 211/1.

postal regulation[139] and rail transport regulation.[140] In these areas, even courts have also created European networks, in order to share their experiences.[141] While significant differences exist in the make-up, the status, the functioning and the tasks of these networks, they do display some common features: among others, they all aim to promote communication and dialogue between regulatory authorities, so as to learn from each other's experience. Recent reforms in the financial services, electronic communications and energy sectors responded to a frequent criticism leveled against the first-generation networks (CESR, ERG, ERGEG), namely that they were content with a mere exchange of views and failed to derive lessons from a comparison of their respective experiences, in the form of best-practice solutions.[142] The newer incarnations of these networks are meant to be tighter and less hesitant to reach conclusions about the practices entertained by their respective members.

3.5.4. *The Open Method of Coordination*

Finally, still at EU level, it could be argued that the Open Method of Coordination (OMC) also creates pressures from within legal orders to examine other legal orders. Introduced in 2000, the OMC involves the setting of goals and objectives at EU level, whereupon Member States elaborate action plans, and then compare their respective experience in order to establish best practices and assess their performance.[143] Because the OMC is typically used in areas where the EU has limited or no competence and it mostly involves soft-law instruments, the OMC has received less attention from legal academics than from political scientists.

3.6. **Implications of legal emulation**

After having set out the broad lines of legal emulation and explored a few illustrations, this heading looks at two implications (among others) of legal emulation.

3.6.1. *Legal emulation and the civil law / common law divide*

By giving substantive policy choices a place in the model – whereas comparative law literature typically downplays or ignores them – legal emulation can contribute to the overthrow of the age-old common law versus civil law divide which still guides much comparative law thinking.[144]

The opposition between common law and civil law (Continental) legal orders has the advantage of simplicity, in its binary nature. Even when refined by sub-dividing the Continental systems

[139] A European Regulators Group for Postal Services (ERGP) was created by a Decision of 10 August 2010 [2010] OJ C 217/7.
[140] In the case of rail transport regulation, a number of regulatory authorities took the initiative to create an Independent Regulators Group – Rail in 2010, see www.irg-rail.eu.
[141] See Maartje de Visser and Monica Claes, "Judicial Networks and the Court of Justice of the European Union", in Antoine Vauchez and Bruno de Witte, eds., *The European Legal Field* (Oxford: Hart Publishing, forthcoming).
[142] Referring back to the discussion of comparative law *supra*, heading 2.1.2., these networks failed to move to a vantage point above the national legal orders and failed to develop an analytical or even normative discourse.
[143] See Erica Szyszczak, "Experimental Governance: The Open Method of Co-ordination" (2006) 12 Eur LJ 486.
[144] See the criticism made by Mattei, *supra* note 70 at 69 and ff.

between Romanic and Germanic families,[145] it remains fairly manageable. From the theoretical perspective set out above,[146] the common law and civil law paradigms could be seen as useful summations of a series of choices made essentially on the institutional, as opposed to the substantive, side.[147] Seen against that background, it is not surprising that these paradigms would emerge from legal science, given that institutional choices are typically the purview of lawyers. Yet, even without detailed evidence to that effect,[148] it should be apparent that broad substantive policy choices will not necessarily be pre-ordained by institutional choices which are mostly privy to the legal community (certainly in this day and age where the domination of lawyers over politics has been broken). To claim otherwise would be to fall in the trap of the 'legal culture' writings.[149] On a more balanced view of law as the outcome of substantive and institutional policy choices, the common law versus civil law distinction becomes only one of the possible ways of explaining divergences or convergences between legal orders.

By and large, legal academics are coming around to that view. Unfortunately, the raw and simple common law versus civil law divide is still very much alive – under the guise of 'legal origins' – in the law and finance literature, in economics.[150] That literature has evolved in step with the large-scale studies conducted by the World Bank into the 'best' legal environment for doing business.[151] It is to be hoped that it will also move to a more sophisticated understanding of the interaction between legal orders.

3.6.2. *Legal emulation and harmonization efforts*

Legal emulation also holds the promise of a better understanding of efforts explicitly directed at bringing about the convergence of legal orders. Without wanting to get into sophisticated distinctions between harmonization, unification, coordination, etc.[152] these various efforts are regrouped under the heading of 'harmonization'. They include, among others, harmonization within the EU context (via directives), international efforts within the WTO, UNCTAD or UNIDROIT or more informal recommendations made by international organizations such as the World Bank or the IMF. They have in common that they represent deliberate ventures designed to lead to change in legal orders, with a view to bringing these systems in closer alignment with one another. They are therefore 'top-down' efforts, as opposed to spontaneous or 'bottom-up'

[145] Common law systems can also be sub-divided between English (and Commonwealth) and American families, but in the comparative law literature, that division is not made so often and so clearly as that between Romanic and Germanic families on the civil law side.
[146] *Supra*, heading 3.3.
[147] The distinction between institutional and substantive choices is introduced *ibid.*
[148] The work of the author on *Tort Law, supra* note 61 certainly showed, on a number of substantive issues, a greater alignment between the English and German legal orders than between the French and German legal orders.
[149] *Supra*, heading 2.2.1.
[150] The seminal article is Rafael La Porta et al., "Law and Finance" (1998) 106 J Pol Econ 1113. See also the review made by the main authors ten years later: Rafael La Porta et al., "The Economic Consequences of Legal Origins" (2008) 46 J Econ Lit 285. For a solid critique of Law and Finance, see Daniel Berkowitz, Katharina Pistor and Jean-François Richard, "The Transplant Effect" (2003) 51 Am J Comparative L 163. G.K. Hadfield, "The levers of legal design: Institutional determinants of the quality of law" (2008) 36 J Comp Econ 43 presents a far more nuanced analysis than the Law & Finance literature; that analysis would fit well within the theoretical perspective sketched out in this chapter.
[151] See the 'Doing Business' project website at www.doingbusiness.org.
[152] As they are made in the model of Ogus and Garoupa, *supra* note 108 for instance.

phenomena, whereby legal orders would converge of their own endogenous motion (deliberate or not), as a result of uncoordinated efforts within each system.

Since the 1990s, comparatists have underlined the risks attached to such 'top-down' harmonization.[153] Essentially, unless harmonization is very broad-based, the harmonized law is bound to clash with the rest of the legal order once it is introduced in national/domestic law. This phenomenon has been studied extensively in the literature on 'legal transplants'.[154] Even if on its face the harmonized law is carefully designed for an optimal fit within national legal orders, tensions may appear under the surface, in the form of 'conceptual divergence', whereby interpretations would differ as between the various harmonized systems, for instance.[155] From a political perspective, harmonization often creates a clash between the strong political will expressed at the superior level within the narrow scope of the harmonization effort,[156] and the weaker and more diffuse political will reflected in the broader legal order.[157] Many legal orders do not adequately channel this tension and fail to resolve it ahead of harmonization. As Ogus and Garoupa pointed out, these costs of harmonization – going beyond learning and adapting, to include also risk of failure – can be considerable and are often neglected. Indeed, Berkowitz et al. show that the success of harmonization efforts depends on the ability to reduce what they call the 'transplant effect', i.e. the tension between the harmonized law and the surrounding and pre-existing national law. The transplant effect is even a greater determinant of success than the substance of the harmonized law.[158]

As a consequence thereof, a more strategic use of comparative law was advocated.[159] In order to improve the quality and the chances of success of top-down harmonization efforts, they should be based on solid comparative law work. Such work would ensure a better fit between the harmonized law and the national laws, i.e. it would reduce the 'transplant effect'.[160] To some extent, these calls were echoed in the largest and latest comparative law endeavour in the EU, namely the preparation of a Common Frame of Reference (CFR). The CFR was meant to provide a point of reference for EU harmonization efforts, so as to ensure that they are firmly grounded in the laws of the Member States.[161] In order to ensure the quality of the CFR, a large-scale EU-wide group of comparatists was entrusted with the preparation of a Draft CFR (DCFR), from

[153] See among others Rodolfo Sacco, "Diversity and Uniformity in the Law" (2001) 49 Am J Comp L 171.
[154] This line of literature stems from the work of Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed. (Athens, Georgia: University of Georgia Press, 1993). The transplant effect is well described and studied in Ogus and Garoupa, *supra* note 108 and Berkowitz et al., *supra* note 150. In "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 Mod L Rev 11, Günther Teubner explores this effect in greater depth, leading him to rebrand transplants as irritants.
[155] See Prechal et al., *supra* note 1.
[156] Leading to the conclusion and enactment of a harmonization instrument, such as a directive.
[157] As embodied in the prior choices, some ancient, which could have ossified and could be relying only on inertia and path dependency for their legitimation.
[158] *Supra*, note 150.
[159] As formulated by Walter Van Gerven, "Bridging the Unbridgeable: Community and National Tort Laws after *Francovich* and *Brasserie*" (1996) 45 Int'l Comp L Q 507 at 539-542.
[160] The more strategic use of comparative law also implies that legal education is changed, so as to make the national legal community less apprehensive towards foreign law and more familiar with comparative law. Legal emulation also gives greater coherence to those efforts.
[161] See the discussion of the purposes of the DCFR, referred to *supra* note 80.

which the CFR would ensue. However, as chronicled elsewhere,[162] the DCFR project followed a traditional comparative law approach, as set out earlier, with the attendant shortcomings. The DCFR does not sufficiently account for substantive policy differences between the Member States. These differences do exist in some areas of private law, even if Member States by and large follow similar policies. As a result, the DCFR suffers from the same overreach as the *praesumptio similitudinis.*

Legal emulation offers a way to correct those shortcomings. By bringing policy choices into the inquiry in the early preparatory stages, for instance, where authorities are not necessarily looking for the best legal order but rather trying to ascertain what the trade-offs are, a legal emulation approach would allow harmonization efforts to take place against a better understanding of what is achievable or not. In the end, legal emulation could deter ill-advised efforts and help to reduce the costs of harmonization in situations where it is advisable.

4. CONCLUSION

This paper sought to explore legal emulation, as an alternative path to regulatory competition models and comparative law endeavours.

Regulatory competition suffers from its very restrictive assumptions (mobility of actors, choice amongst many jurisdictions, ability of jurisdictions to select the laws they desire, no externalities), which make it a relatively rare occurrence in practice. In addition, regulatory competition, being exogenously driven, requires that firms take informed decisions, where law is crucial to the decision and the decision can be taken in isolation from other decisions. It also takes an impoverished view of law as rules (including the context of their interpretation and application), where the substance of the law matters little for the outcome and legal actors are essentially passive.

The use of a functionalist method – however ill-defined it may be – potentially enables comparative law to rise above national legal orders, to become analytical and even normative (as opposed to merely descriptive) and to gain a dynamic perspective. Yet functionalist comparative law has remained mostly mono-disciplinary, as shown by the commonly accepted *praesumptio similitudinis*, the assumption that legal systems should be similar, which ignores the broader policy context. It also lacks a dynamic dimension, a solid account of how and why legal systems interact with one another over time.

Legal emulation builds on more recent literature, including comparative law and economics. It tries to combine the more dynamic perspective of regulatory competition, with the endogeneity of comparative law, all the while taking better account of the policy context. Legal emulation rests on a theoretical perspective whereby the law is conceived as the outcome of a series of choices – substantive or institutional, fundamental or transient – made between different options (legal science would then be the investigation of the set of those choices). As a model, legal emulation involves the following steps: first of all, the framework of reference for the inquiry is fixed, together with the normative standard. Secondly, a number of legal orders are analysed, in order to identify the choices made in the law (each with a number of options to be chosen from).

[162] Chirico et al., *supra* note 87.

Thirdly, the options identified in the second step are compared, on the basis of the normative standard set out in the first step, so that in a final stage, a conclusion can be drawn. Depending on whether choices are held constant (as part of the normative standard) or instead left open within the framework of reference, the inquiry can be narrow or broad. The paper argues that legal emulation is already present in many legal orders, through instances such as constitutional, EU or human rights review; impact assessment; peer review within networks of authories; or the open method of coordination. These instances can be seen as illustrations of an emerging principle of quality of law, which would rest on a legal emulation model.

Finally, the paper outlines some consequences of adopting a legal emulation model. For instance, legal emulation allows to relativize, and even sidestep, the civil law / common law divide which is still entrenched in comparative law (and law and finance) literature. It also provides a more solid basis to ascertain whether top-down harmonization efforts are necessary and justified, and what they can achieve.

Undoubtedly, more research is needed to work out the legal emulation model and explore its consequences further. As a starting point, it is useful to have an alternative to the regulatory competition model and the comparative law approach, which is conceptually sound and can tie together and explain a number of existing phenomena in the various legal orders.